agree in any manner to keep the price of such article, product, commodity or transportation at a fixed price, or in any manner establish or settle the price of any article of merchandise, commodity, . . between them or between themselves and others"? Are their agreements such "the tendency of which is to prevent or preclude a free and unrestricted competition among themselves or others or the people generally in the production, sale, traffic or transportation of any such article of merchandise, product or commodity"? Do they thereby so "agree to pool, combine or unite any interest they may have in connection with the sale, production, or transportation of any such article of merchandise, product or commodity or the carrying on of any such business, that its price might in any manner be affected thereby"? *Second.* Where the policy of the state is to strike down trusts and monopolies, and legislation is aimed at certain of them, is it an unfair, unreasonable and illogical discrimation to except labor trusts and agreements to fix and maintain the price of labor, and to prevent competition among themselves, if not with others, in an indispensable ingredient of all such articles of merchandise, produce or manufacture?

Both of these questions, the supreme court of Nebraska answers in the negative, on the ground that "labor and skill are not articles of commerce—at least not in the same sense as the articles produced; and . . the classification which distinguishes them and provides for a diversity of legislation with respect to them, is reasonable and proper."

The United States circuit court, by McPherson, District Judge, gives a different answer: "By saying that associations of laboring men are exempt from the provisions of the statute, it is thereby stated, in meaning, that unorganized labor must pay the penalties of a criminal statute for an act done by a member of an organization and by him done with impunity. On one side, by this legislation, we have organized labor. Those men are not amenable to the statute. On the other side we have men who do not belong to organized labor—farmers, merchants, professional men, laborers, as well as all others. They are amenable, and, by this statute, that is called 'equal protection.' I do not believe it. Such legislation has been denounced by the supreme court of Nebraska: *Low* v. *Printing Co.* 41 Neb. 127, 59 N. W. 362. Dozens of statutes have been held invalid by appellate courts which sought to make it invalid for one class of men to do one thing and lawful for other men, practically under the same circumstances, to do another, but like, thing."

PREFERENCES ARISING FROM TRUST RELATIONS.—Under this title, in a former number of the REVIEW, what has been called the modern doctrine in regard to the tracing of trust funds was examined, and an attempt was made to explain the extent and the limitations of the doctrine as apparently fixed by the decided trend of recent authority. MICHIGAN LAW REVIEW, VOL. I, NO. I, *p. 1.* It was there shown that the old rule that required specific identification has been so far modified that the equity of the *cestui que trust* may be preserved, and his priority of right over other creditors sustained in case of the insolvency of the trustee, even where there has been a confusion of the trust funds with the trustee's own property, provided the property impressed with the trust, or that which represents it in the way of proceeds, forms a

part of the estate of the insolvent; that under such circumstances the modern doctrine converts the equity into a charge upon the entire mass, the extent of the lien being measured by the extent to which the trust funds have contributed to the mass. But it was also there shown that when the trust property has been dissipated, so that neither the property nor that which represents it, forms any part of the insolvent's estate, the basis of the preferential trust claim is gone, and that, under such circumstances, the *cestui que trust* has simply the rights of a general creditor; in other words, "that the basis of the preferential trust claim must be trust property, not necessarily trust property that can be identified in specie, or in a substituted form, but trust property that can at least be identified as having gone into a larger mass, and as still remaining a part thereof." As explained in the article to which reference is made, a few courts have carried this modern doctrine to an extent that cannot be justified by reason or authority, holding in effect that the trust relation itself will give a preference as against general creditors, even though the trust property has been dissipated, if it has been used in the payment of claims against the insolvent that otherwise would be obligations against the estate, the reasoning being that by the payment of such claims the general estate is benefited and should be held liable to the *cestui que trust* to the extent of the trust property that has been used for that purpose. The position is indefensible; and in most of the states in which this advanced doctrine has been declared, the courts have recently been seeking a way for graceful and consistent retreat. In a few instances attempts have been made to qualify and limit the extreme view, but they have generally resulted only in misunderstanding and confusion. Usually no better way out of the difficulty has been found than by squarely overruling the erroneous decisions and restating the principles that are thereafter to guide the court. This was done in Wisconsin (*Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237), and the same course has recently been taken in Nebraska in the case of *Lincoln Savings Bank and Safe Deposit Co.* v. *Morrison* (May 22, 1902), 90 N. W. 905, 57 L. R. A. 885.

In *Capital National Bank* v. *Coldwater National Bank*, 49 Neb. 786, this court expressly recognized the rule that if the insolvent's estate has in any way been augmented by the commingling with it of trust funds, a preferential claim against the estate would exist, even though no part of the funds or their proceeds went to make up the estate at the time it came to the hands of the receiver. The authority of *McLeod* v. *Evans*, 66 Wis. 401, is expressly recognized, and that of *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237, expressly repudiated. "The reasoning of the majority . . . . found in *McLeod* v. *Evans*," says the court, "seems to us very satisfactory, and it is none the less so because it is now merely questioned by another majority of that court entertaining other views." The decision was certainly in accordance with the previously expressed opinion of this court, *State ex rel. Ladenburger* v. *State Bank*, 42 Neb. 896, 61 N. W. 252, and was recognized as the doctrine of the court in the subsequent case of *State* v. *Midland State Bank*, 52 Neb. 1, 71 N. W. 1011. But an attempt was soon made to escape from the consequences of this extreme doctrine. In *State* v. *Bank of Commerce*, 54 Neb. 725, the court expressly repudiated the doctrine of *McLeod* v. *Evans*. After referring to that case and other cases in other states in which a similar

doctrine is announced, the court said: "We think the correct doctrine, and the one supported by the decided weight of authority is that the beneficiary of a trust fund, solely because of the character of his claim, is not entitled to the payment of the same in full, to the exclusion of other creditors, out of the assets of the insolvent trustee's estate; that when trust funds are wrongfully converted, the beneficiary is entitled to the funds themselves, or to the proceeds of the investment of them, so long as he can definitely trace them, and before they reach the hands of an innocent holder; that when a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money; that it will be presumed the cash assets on hand when the trustee failed and the receiver took possession of his estate, were part of the trust money; that when trust funds are wrongfully converted, and not only do not remain in the hands and are not found among the assets, of the wrong-doer, but are actually traced out of his hands and shown to have been dissipated, then the beneficiary of the trust fund is not entitled to have his claim allowed as a preferred one against the estate of the insolvent wrong-doer." This statement of doctrine is certainly in the right line, and but for the unfortunate attempt in the subsequent part of the opinion to harmonize the previous holding of the court with the rule as stated, it would have served the purpose for which it was doubtless intended, namely, the making of a record that would show a repudiation by the court of the indefensible doctrine of *McLeod* v. *Evans*. The attempt at distinguishing and harmonizing seriously detracted from the force of the case as an authority. It is said that "in *Capital National Bank* v. *Coldwater National Bank*, 49 Neb. 786, there were in the vaults of the insolvent trustee, at the time of its failure, $11,000 in cash. The trust fund amounted to $4,000, and we held that the beneficiary was entitled to have his claim preferred to that of other creditors of the insolvent trustee. This case, then, is in line with the conclusion reached in the case at bar." But the court is in error as to the facts, as an examination of the case will show. The sum in the hands of the trustee was certainly greater than the claim in this particular case in which the opinion was rendered; but four other cases which involved the same state of facts were, by agreement, submitted and decided at the same time, and the aggregate of the claims considerably exceeded the amount on deposit. "The record in each case showed that fact," says the court in *Lincoln Savings Bank & Safe Deposit Co.* v. *Morrison*; and this is accompanied by the further statement that "*State* v. *Bank of Commerce* is not reconcilable with prior decisions of the court, and must stand on its own foundations, which we think it may do safely." The court might well have added that in *Capital National Bank* v. *Coldwater National Bank*, the doctrine of *McLeod* v. *Evans* was expressly accepted as sound, while that of the subsequent overruling case of *Nonotuck Silk Co.* v. *Flanders*, was expressly repudiated. The case of *State* v. *Midland State Bank*, 52 Neb. 1, is disposed of in the same way, although the court states that the fact that distinguishes it, namely, that the amount in the hands of the insolvent trustee exceeded the amount of the trust claim, "does not appear in the opinion." The case of the *State* v. *State Bank of Wahoo*, 42 Neb. 896, is disposed of as follows: "In that case the trust property consisted of money, and the claim of the beneficiary of this fund was ordered paid as a preferred

claim out of the assets of the insolvent trustee, a bank. The opinion does not disclose whether the cash in the vaults of the bank at the time of its failure was equal to or exceeded the amount of the trust fund, and I have not access to the record and cannot therefore say what the record did disclose in that respect; but it was never the writer's intention to hold that the beneficiary of a trust fund, simply because of the character of that fund, was entitled to a preference out of the assets of the estate of the insolvent trustee, and the case is not to be regarded as an authority for that doctrine. It was not the intention of the court or the writer of that opinion to adopt the doctrine of *McLeod* v. *Evans*." If this be so, it may be pertinent to ask why the court in that case expressly refers to *McLeod* v. *Evans* as decided upon the correct principle, and as an authority for a similar holding in the case under consideration.

It is apparent that this attempt to harmonize and distinguish was lame in the extreme, and that the court would have better served the profession and the public by an explicit and frank overruling of its previous decisions upon the subject. In the subsequent case of *Morrison* v. *Lincoln Savings Bank & Safe Deposit Company*, 57 Neb. 225, the court recognizes the conservative rule in the following language: "It is familiar doctrine that the owner of property may follow and reclaim it, so long as it can be identified and distinguished; and that when one holding the property of another in trust commingles it with his own so that separation and identification are no longer possible, the owner of that trust property will be given a lieu for its value on the entire mass of which his property forms a part. But to entitle the owner of trust property to a preference over the general creditors of an insolvent trustee, it must appear that his property, or its proceeds, went into and became a part of the fund or estate upon which it is sought to impress a trust. *Cavin* v. *Gleason*, 105 N. Y. 256; *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237, 58 N. W. Rep. 383; *State* v. *Bank of Commerce*, 54 Neb. 725, 75 N. W. Rep. 28."

The foregoing case, however, although declaring the correct doctrine, does not in express terms overrule the earlier decisions; and that the attitude of the court in regard to the question was not considered as fully determined, and as still in a condition of uncertainty, is apparent from the fact that the subject is again presented for adjudication in the recent case to which reference has been made, *Lincoln Savings Bank & Safe Deposit Co.* v. *Morrison*, (May 21, 1902), 90 N. W. 905, 57 L. R. A. 885, and the court is asked to reaffirm the rule recognized in its earlier decisions. This, however, the court refuses to do, and in no uncertain terms overrules the earlier decisions and declares the principles by which such cases are to be decided. After referring to the decisions in which there had been a departure from the earlier extreme views, the court says: "Ordinarily we should not feel justified in reviewing a question determined by two recent decisions of this court. Were it a mere matter of these two decisions, so long as we feel satisfied that they are sound, we should do no more than cite them and proceed to apply them to this controversy. But in several prior cases (*State ex rel. Ladenburger* v. *State Bank*, 42 Neb. 896, 61 N. W. 252; *State* v. *Midland State Bank*, 52 Neb. 1, 71 N. W. 1011; and especially *Capital Nat. Bank* v. *Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115), this court had expressly or by strong implication recognized and adopted a different rule. The cases

last cited are sought to be distinguished in *State* v. *Bank of Commerce*, 54 Neb. 725, 75 N. W. 28. Counsel have pointed out, however, that the attempt to distinguish the latter case from *Capital Nat. Bank* v. *Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115 is founded on an entire misapprehension of the facts there presented; and in any event, the reasoning in these two cases and the authorities severally relied on therein cannot be reconciled. For this reason we think it expedient to state plainly that this court no longer adheres to the extreme view as to the right of the *cestui que trust* to be preferred on insolvency of the trustee, expressed in the cases of *State* v. *State Bank*, *State* v. *Midland State Bank* and *Capital National Bank* v. *Coldwater Nat. Bank*, but adheres to the position taken in *State* v. *Bank of Commerce*, 54 Neb. 725, 75 N. W. 28, and *Morrison* v. *Lincoln Savings Bank & S. D. Co.* 57 Neb. 225, 77 N. W. 655; to set forth our reasons for rejecting the one view and adopting the other; and to state as clearly and definitely as we may the rules by which causes such as the one at bar are to be decided." After discussing the origin and development of the modern rule, criticising the cases in which the extreme view, as exemplified in *McLeod* v. *Evans*, has been announced, and citing many recent cases in which the more conservative doctrine has been sustained, the court continues: "These cases and many others * * * establish clearly that misappropriation of a trust fund does not entitle *cestui que trust*, merely as such, and for that reason alone, to a preference over general creditors of an insolvent trustee. So long as the trust property, in any shape or form, can be recognized, it belongs to the *cestui que trust*, so long as it enters into any fund, property, or mass of assets in any way, *cestui que trust* has a charge or lien, which he may enforce upon the whole. But if the trustee 'destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust.' Wood, V. C., in *Frith* v. *Cartland*, 2 Hem. & M. 417. In such case, *cestui que trust* has no specific claim against any property or fund. He is merely a creditor of the trustee and stands on the same basis as other creditors. The right to a preference is based on his ownership of some specific fund or assets, or on a claim or charge upon all the fund or assets, because his property is contained in, or has contributed to them. In other words, to obtain a preference, *cestui que trust* must show that the estate out of which he claims such preference, has been increased to some extent by the misappropriation of the trust property, and he is entitled to a preference to the extent of such increase only." With this decision, doubt as to the attitude of the Nebraska court upon this question cannot exist.

The course of adjudication in the supreme court of Michigan in regard to preferential trust claims has been in many respects similar to that in the supreme court of Nebraska, although in the former there has not been, as in the latter, an ineffectual attempt at harmonizing the conflicting decisions of the court, and unfortunately there has not been, so far as the writer has observed, any direct repudiation of those decisions in which the extreme doctrine has been followed. In several cases, the doctrine of *McLeod* v. *Evans* has been recognized and directly applied. See *Wisconsin Marine and Fire Insurance Company Bank* v. *The Manistee Salt and Lumber Company*, 77 Mich. 76; *Carley* v. *Graves*, 85 Mich. 483. But in *Sherwood* v. *Milford Bank*, 94 Mich. 78, the court recognized the soundness and wisdom of the conservative rule, though not in so vigorous a way as could be

wished. It refused to apply the case of *Carley* v. *Graves*, but did not in terms overrule the case. The court said, however, that "to adopt a rule which would permit the petitioners under the facts in this case, to impose upon this transaction the character of a trust, enforceable as such against the receiver, without either tracing any of its results into his hands or showing that it was for the benefit of those who have an interest in the assets, thus enabling them, with others similarly situated, to convert to the payment of their own debt the assets of the bank, to the exclusion of the general depositors, whose money, as it is plain to be seen from the record, was the source from which all the assets of the bank were obtained, would be grossly inequitable, and would be an unwise departure from those safe rules which the courts have adopted and very generally adhered to in relation to the rights and obligations existing between trustees and *cestuis que trustent.*" However, in *Wallace* v. *Stone*, 107 Mich. 190, the authority of *McLeod* v. *Evans* was again invoked by the majority of the court, Justice Hooker dissenting. But the rule of the dissenting opinion was approved by the full bench in *Sunderlin* v. *Mecosta County Savings Bank*, 116 Mich. 281. And finally in *Board of Fire and Water Commissioners of Marquette* v. *Wilkinson*, 119 Mich. 655, the court unanimously announced in unmistakable terms the conservative rule, although the authority of the earlier cases was not directly repudiated. After a careful examination of a number of the recent cases in which the modern rule was applied within the limits of reason and authority, the court said: "This review of cases might be extended indefinitely, as will be shown by the numerous citations contained in the cases discussed. They seem to effectually dispose of the claim that the entire estate of an insolvent trustee can be subjected to the claims of a *cestui que trust*, to the exclusion of general creditors, and firmly establish the proposition that one who seeks such relief must be able to trace the trust property to some specific fund or piece of property, and that, when this is done, there is a presumption that what remains of such fund or article is the trust fund or its proceeds. The burden of proof is upon the complainant, and, in the opinion of Mr. Justice Bradley 'he should make it out not only by preponderance of proof, but by a very clear preponderance.' *Frelinghuysen* v. *Nugent*, 36 Fed. 237."

In the history of this question in the courts that have taken the extreme view and then receded from it, we have a striking illustration of the danger of departing from well settled principles upon specious reasoning simply, and without a full examination, in all of its bearings, of the basis of such principles and a clear understanding and appreciation of what may be the logical consequences of a change in doctrine. It is apparent from a reading of the extreme cases upon this subject that a desire to do what has *seemed* in the particular case to be equitable, has frequently led these courts to conclusions that cannot stand the test of general application, because reached without sufficient regard for fundamental principles. Courts should, of course, consider the equity of the particular case under investigation, but this equity should always be worked out in accordance with the elemental principles of equity jurisdiction; otherwise the certainty and stability of the system, so necessary for the protection of the rights of litigants and for the guidance of the profession, will be sacrificed.